No. 86-616

Supreme Court, U.S.
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SUPREME COURT OF THE UNITED STATES

October Term, 1986

BEN ROGERS - - - - - - Petitioner

versus

UNITED STATES OF AMERICA - - Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

1. Did the failure to establish probable cause in the affidavit seeking wiretap authorization require suppression?

2. Was the failure to subject the affidavit to exacting scrutiny erroneous?

3. Did the affidavit fail to establish probable cause for surveillance of a particular location because the allegations in the affidavit pertained to another location, and the authorizing judge was not informed of this circumstance?

4. Should the wiretap evidence be suppressed because the affidavit failed to set forth information crucial to a determination of the necessity for the wiretap, as required by 18 U.S.C. § 2518?

5. Should the government be required to disclose the identities of confidential informants because of extensive misrepresentations appearing in the affidavit attributed to informants?

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SUPREME COURT OF THE UNITED STATES

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No.

BEN ROGERS - - - - - - - *Petitioner*

v.

UNITED STATES OF AMERICA - - *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner respectfully prays that a Writ of Certiorari issue to review the opinion of the Court of Appeals decided and filed on July 23, 1986.

OPINION BELOW

The opinion of the Court of Appeals was decided and filed on July 23, 1986 (Appendix A), which the Fifth Circuit determined "should not be published." A petition for rehearing was filed. The order of the Court of Appeals denying the petition for rehearing was entered on August 20, 1986 (Appendix B).

JURISDICTION

The opinion of the Court of Appeals (Appendix A) was decided and filed on July 23, 1986; and a timely petition for rehearing was denied by order of the Court of Appeals for the Fifth Circuit (Appendix B) on

August 20, 1986. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1) and Rule 20.1.

CONSTITUTIONAL AND STATUTORY PROVISIONS

Constitutional Provisions:

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Statutory Provisions:

Section 2518(1)(c), Title 18, United States Code, provides:

> Each application shall include the following information:
>
> (c) a full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous. . . .

STATEMENT OF THE CASE

Petitioner, Ben Rogers, was one of 18 individuals indicted and charged with conducting an illegal gambling business (18 U.S.C. § 1955) and illegal use of interstate facilities (18 U.S.C. § 1952) as well as con-

spiracy and aiding and abetting in the commission of those offenses.

Numerous pretrial motions were filed attacking the admissibility of evidence obtained as a result of a wiretap authorized pursuant to 18 U.S.C. § 2516. The motions requested an order suppressing the wiretap and all evidence resulting therefrom on the grounds that the authorization was unsupported by probable cause, that the government failed to exhaust the investigative alternatives as required by 18 U.S.C. § 2518, that the authorization was invalid because unsupported by probable cause for each alleged participant, and that the authorization was invalid because of misrepresentations made to the authorizing judge by the affiant.

On April 30, 1985, the Magistrate before whom a hearing on the motions was held denied all motions. Timely objections to that Report and Recommendation were filed. However, the District Court denied the motions by order dated June 13, 1985 (Appendix C).

Pursuant to an agreement under Rule 11(a)(2) of the Federal Rules of Criminal Procedure, Petitioner entered a conditional plea of guilty to counts one and two of the indictment, reserving the right to appeal the District Court's order denying the pretrial motions.

In late summer of 1983, FBI Special Agent James Magee undertook an investigation of bookmaking in the Shreveport, Louisiana area. It appears likely that Agent Magee intended to request a Title III intercept from the inception of his investigation. Although the Internal Revenue Service had previously conducted an investigation into related bookmaking activities, Agent

Magee failed to obtain from the agent in charge of that investigation anything other than minimal information, and avoided receiving information showing that surveillance over a long period of time was possible, and ignored other investigatory matters that contradicted statements later asserted in Agent Magee's request for a wiretap.

It was discovered during a hearing in the present case that Agent Magee had copied much of "the DeLuna affidavit," an affidavit used in a previous unrelated case in New Orleans, including extensive factual allegations that did not apply to the instant case, and represented those allegations as facts learned in his investigation of this case in his request for a wiretap.

Agent Magee learned, while application documents were in Washington under consideration, that Dick Stevens, whose telephone communications Magee wished to intercept, had moved his residence and changed his telephone numbers entirely. A new affidavit was prepared, with the addition of two pages making reference to two alleged contacts with the new residence. All previous allegations were retained intact as though they had always applied to the new residence, and the court to whom the application was submitted was never informed that all but two pages of the original affidavit pertained to a residence different from the one for which the wiretap was requested.

Agent Magee's affidavit relied upon the hearsay statements of four confidential informants in seeking to establish probable cause for the intercept. Much of

the 12-day hearing on this matter consisted of proving inconsistencies between information received from informants and what was included in the Magee affidavit as well as the unreliability of these informants.

On December 13, 1983, based upon the information provided in the affidavit and application, Judge Henry A. Politz, Judge of the Fifth Circuit Court of Appeals, authorized the wiretap. The wiretap remained on Stevens' telephones for a period of 22 days. The instant prosecutions are based upon information received from telephone calls intercepted during that period.

REASONS FOR GRANTING THE WRIT

1. The Failure to Establish Probable Cause in the Affidavit Seeking Wiretap Authorization Requires Suppression.

Principles announced in *Franks* v. *Delaware,* 438 U. S. 154 (1978), and other Fourth Amendment cases disqualify an affidavit for material false statements made either knowingly or with reckless disregard for the truth necessary for the finding of probable cause. In *Franks,* this Court settled the question of the extent to which a defendant may be permitted to attack the veracity of a warrant affidavit after the warrant had been issued and executed. In that case, it was noted that the warrant clause itself takes the affiant's good faith as its premise; and, when the Fourth Amendment demands a factual showing sufficient to comprise probable cause, the obvious assumption is that there will be a truthful showing. This showing must be truthful in the sense that the information put forth is be-

lieved or appropriately accepted by the affiant as truth. This Court further stated:

> Because it is the magistrate who must determine independently whether there is probable cause [citations omitted], it would be an unthinkable imposition upon his authority if a warrant affidavit, revealed after the fact to contain a deliberately or recklessly false statement, were to stand beyond impeachment. *Franks,* 438 U. S. at 164-165.

There are three elements to a *Franks* v. *Delaware* claim: (1) a false statement, (2) which is made by the affiant with knowledge of the falsity, or with reckless disregard for the truth, (3) that is material (in that the affidavit would have been insufficient to establish probable cause without the false statement). *Franks,* 438 U. S. at 155-156. In order for a *Franks* challenger to meet his burden of proof, he need not prove that the affiant intentionally or deliberately deceived the court. Proof of reckless disregard for the truth will be sufficient.

In the District Court, the petitioner and co-defendants provided substantial evidence proving that Agent Magee deliberately lied to Judge Politz and intentionally concealed material facts from Judge Politz in order to obtain court authorization for a wiretap. One of the problems with the current affidavit is that Special Agent Magee has copied verbatim large portions of factual information that had been used in an unrelated case in New Orleans five years previously. An examination of the two affidavits reveals that 20 pages

of the 43 page affidavit in this case contain verbatim quotes from "the DeLuna affidavit." Judge Politz was led to believe that Magee's affidavit represented Magee's personal observations and facts learned in the present investigation when, in fact, Magee had simply copied these allegations directly from the DeLuna affidavit.

Of the numerous instances of falsehoods and omissions which the petitioner and co-defendants presented at the *Franks* hearing, the District Court agreed that Agent Magee intentionally lied to Judge Politz on at least three occasions. [Memorandum Ruling, pp. 22, 25, 26; Appendix C, pp. 32a, 35a.] The Fifth Circuit's opinion also acknowledges several *Franks* misrepresentations. [Opinion, pp. 4, 10, 11; Appendix A, pp. 3a, 8a, 9a.]

Nevertheless, both courts determined that the remaining portions of the affidavit were sufficient to establish probable cause to believe that interception of telephone conversations at 356 Jennifer Lane would yield evidence of violations of the federal gambling statutes.

It is respectfully submitted that the determinations of the courts below were incorrect, and that the failure to establish probable cause in the affidavit seeking wiretap authorization requires suppression.

2. Failure to Subject the Affidavit to Exacting Scrutiny Was Erroneous.

In *Illinois* v. *Gates*, 462 U. S. 213 (1983), this Court stated, "[P]robable cause is a fluid concept—turning on the assessment of probabilities in a particular fac-

tual context—not readily, or even usefully, reduced to a neat set of legal rules." *Id.* at 232. Because electronic surveillance is a method of search and seizure which is highly invasive of the privacy interests protected by the Fourth Amendment, the standard for probable cause is higher when electronic surveillance is involved. *Olmstead* v. *United States,* 277 U. S. 438, 531 (1927) (Brandeis, J., dissenting).

This Court has held that where electronic surveillance is the method of search, a greater factual showing of probable cause is required.

> The need for particularity and evidence of reliability in the showing required when judicial authorization is sought is especially great in the case of eavesdropping. By its very nature eavesdropping involves an intrusion on privacy that is broad in scope. As was said in *Osborne* v. *United States,* 385 U. S. 323, 329 n. 7 (1966), the "indiscriminate use of such devices in law enforcement raises grave constitutional questions under the Fourth and Fifth Amendments," and imposes "a heavier responsibility on this Court in its supervision of the fairness of procedures. . . ." *Berger* v. *New York,* 388 U. S. 41, 56 (1967).

The use of intentional misrepresentations by Agent Magee in order to obtain judicial authorization for a search technique as intrusive as electronic surveillance required that the Magee affidavit be given the most exacting form of judicial scrutiny. Having determined that Agent Magee lied to Judge Politz in order to obtain Judge Politz's signature on an authorization,

the District Court and the Court of Appeals erred by simply underestimating the negative effect which those lies had on the remaining portions of the Magee affidavit. Properly reviewing the "truthful" portion of the Magee affidavit in light of the intrusive nature of electronic surveillance and Magee's disrespect for the integrity of the Court compels the conclusion that the motion to suppress electronic surveillance should have been granted. It is respectfully submitted that failure to subject the affidavit to exacting scrutiny was erroneous.

3. The Affidavit Failed to Establish Probable Cause for Surveillance of a Particular Location Because the Allegations in the Affidavit Pertained to Another Location and the Authorizing Judge was Not Informed of this Circumstance.

The Fourth Amendment to the United States Constitution provides in pertinent part:

> [N]o warrant shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched. . . .

The Fourth Amendment demands that defendants be permitted to challenge an affidavit on the basis of intentional or reckless omissions as well as actual misrepresentations contained in the four corners of the affidavit.

In the present case, Agent Magee failed to reveal to the court that almost all of the affidavit supporting the wiretap application had been prepared with reference to another residence and different telephone lines from

the ones involved in the ultimate application to the court.

An original affidavit and application for a wiretap at Dick Stevens' house on Caplis-Sligo Road had been submitted to the Department of Justice for approval when Agent Magee learned that Dick Stevens had moved. This brought about a termination of the original application. However, the original affidavit was hardly changed before being resubmitted to Washington for authority to intercept a different set of telephone lines with different numbers at a different residence.

Two pages pertaining to the new residence were added. No changes were made in the "need for interception" section. The two new pages made reference to two contacts with the Jennifer Lane residence by one of the four informants. Thus, the affidavit under consideration for an intercept at 356 Jennifer Lane was prepared almost entirely for a location on Caplis-Sligo Road. Everything in the affidavit pertains to incidents that allegedly took place at the Caplis-Sligo Road location, except for one telephone call and one supposed visit by one of the confidential informants.

In a Title III affidavit, candor with the court is imperative. It is the judge's responsibility to decide whether the government's burden has been met or not. The decision cannot be made unless the court is given all the facts. In this case, Judge Politz was never told that 40 pages of the present affidavit were prepared with regard to a different residence entirely. Ten-

dering to the court an affidavit which was largely prepared for a different location, without making this fact known, is a lack of candor which should be fatal to the affidavit. The court did not have all the facts, and it is unknown what the court's decision might have been if it had been given the opportunity to evaluate this factor.

It is respectfully submitted that the affidavit failed to establish probable cause for surveillance of a particular location because the allegations in the affidavit pertained to another location and the authorizing judge was not informed of this circumstance.

4. The Wiretap Evidence Should Be Suppressed Because the Affidavit Failed to Establish the Necessity of the Wiretap, as Required by 18 U.S.C. § 2518.

Section 2518(1)(c) of Title 18, United States Code, requires

> a full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous.

When Agent Magee began his investigation of Dick Stevens and others for bookmaking, extensive investigation had already been conducted by IRS Agent Tommy Patterson. Agent Patterson had conducted a recent bookmaking investigation in the Shreveport area, involving three of the same subjects Agent Magee was investigating. Agent Patterson's investigation included three months of active surveillance.

Agent Magee met with Agent Patterson on only one occasion. The extent of the conversation was Magee asking Patterson whether Dick Stevens had been a subject of Patterson's investigation. Patterson answered in the affirmative. But Agent Magee made no effort thereafter to discover what surveillance efforts had been tried by Patterson, and to what effect.

Other affidavits and records were also available to Magee in court records, including prior search warrants, affidavits and returns, and a related forfeiture proceeding. Again, Magee chose to ignore these "other" investigative procedures. Failure to obtain and utilize information from Agent Patterson and other investigative procedures, and failure to outline these other procedures to the authorizing judge, constituted a clear indication of Magee's reckless disregard for the requirements of Section 2518(1)(c).

Accordingly, it is respectfully submitted that the wiretap evidence should be suppressed because of Magee's failure to establish the necessity of the wiretap, in the manner required by 18 U.S.C. § 2518.

5. The Government Should Be Required to Disclose the Identities of Confidential Informants Because of Extensive Misrepresentations Appearing in the Affidavit Attributed to Informants.

In *Franks* v. *Delaware,* this Court stated:

> [T]he Warrant Clause itself . . . surely takes the affiant's good faith as its premise. "[N]o warrants shall issue, but upon probable cause, supported by oath or affirmation. . . ." Judge

> Frankel . . . put the matter simply: "[W]hen the Fourth Amendment demands a factual showing sufficient to comprise 'probable cause,' the obvious assumption is that this will be a *truthful* showing." *Id.* at 164.

Agent Magee used four (4) informants in alleging probable cause for a Title III intercept. There were numerous deficiencies in the use of these informants which constitute material misrepresentations and omissions. In some instances, the evidence proved that information received from informants was changed or enhanced. In other instances, factual material was set forth in a conscious effort to mislead. Additionally, as to one informant in particular, there was sufficient background material known to Agent Magee that called into serious question that informant's credibility; yet Agent Magee vouched for this informant's credibility and failed to advise the court of any of the many factors that would cause the informant's reliability to be severely questioned.

The District Court and the Court of Appeals found that Magee three times deliberately lied to the authorizing judge about the veracity of three of the confidential sources. In *Franks,* this Court did not have to decide the question which now confronts this Court: "[W]hether a reviewing court must ever require the revelation of the identity of an informant once a substantial showing of falsity has been made." *Franks,* 438 U. S. at 170.

In light of Magee's demonstrated dishonesty, a full disclosure of his alleged contacts and conversations

with the confidential sources is essential to a fair determination of the extent to which Magee violated the protection of the Fourth Amendment.

The information sought is essential to fairly determine the extent of the Fourth Amendment violation. The evidence of deliberate falsehoods and omissions which has been presented has a cumulative effect, requiring full disclosure. The defendants' need for disclosure outweighs the government's purported interest in maintaining secrecy about Magee's relationship with the confidential sources. It is respectfully submitted that the government should be required to disclose the identities of confidential informants because of extensive misrepresentations appearing in the affidavit attributed to informants.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 85-4685

UNITED STATES OF AMERICA, - - *Plaintiff-Appellee,*

v.

ARTHUR RICHARD STEVENS, III, ROBERT L. MERILLAT, RICHARD HAVILAND CARSON, LARRY P. BOURQUE, RONALD DEAN MERCHANT, GLEN WILLIAM ROCKETT, CHARLES BRYAN WEBSTER, BEN ROGERS, RUEBEN GOLDSTEIN, VICTOR KYLE CALLAHAN, ROBERT LEE CALLAHAN, JESS MICHAEL ROSS, III, GEORGE MICHAEL GAUTHIER, JERRY MCCOLLUM, LLOYD GILLIS STEWART, JR., NORMAN SHABAS and FRED BARNES, SR., - - - *Defendants-Appellants.*

Appeals from the United States District Court
For the Western District of Louisiana

(July 23, 1986)

Before REAVLEY, RANDALL and DAVIS, Circuit Judges.

DAVIS, Circuit Judge:*

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*Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burden on the legal profession." Pursuant to that Rule, the court has determined that this opinion should not be published.

Appellants were indicted on charges of conducting an illegal gambling business in violation of 18 U.S.C. § 1955 and use of interstate facilities to conduct gambling in violation of 18 U.S.C. § 1952. Appellants moved to suppress evidence obtained by the government obtained through a wiretap of appellant Stevens' residence. These motions were denied and each appellant then entered a guilty plea to at least one of the pending charges conditioned on affirmance of the denial of his motion to suppress. We find no error in the district court's ruling on these motions and affirm.

I.

In the summer of 1983, Special Agent James Magee of the FBI began investigating bookmaking activity in the Shreveport, Louisiana area. One of the principal subjects of this investigation was appellant Stevens who lived first in a rural area on Caplis Sligo Road in Bossier Parish, Louisiana, and later on Jennifer Lane in Shreveport. During the initial months of the investigation, Magee and other agents received information from four confidential sources who had placed bets with Stevens and were generally familiar with appellants' gambling operation. Faced with reluctant witnesses and difficulties in obtaining evidence by conventional methods, Magee sought permission from the Department of Justice to apply for an order authorizing interception of telephone communications from Stevens' home on Caplis Sligo Road. Magee prepared a forty-two page affidavit supporting his conclusions that he had probable cause to believe a gambling operation was being conducted from Stevens' Caplis Sligo Road residence and that a telephone wiretap was necessary to obtain evidence of the full scope of the gambling operation. While the Department of Justice was considering Magee's affidavit and

other documents, Stevens moved his residence from Caplis Sligo Road to Jennifer Lane and Magee amended the affidavit to reflect the change of address.

After obtaining Justice Department authority to do so, Magee presented the application for the interception of wire communications and supporting affidavit to Judge Henry Politz; Judge Politz authorized the interception of wire communications from Stevens' Jennifer Lane residence for a period of thirty days. After the intercept authorization terminated, Magee obtained a conventional warrant to search the Jennifer Lane residence based on information gathered from the wiretap. The government's case against appellants was largely predicated on evidence gleaned from the wiretap and the search of Stevens' residence.

Appellants in their motions to suppress challenged the affidavit as insufficient to support the wiretap authorization. The district court, in denying the motions, held that although two statements in the affidavit were misrepresentations in violation of *Franks* v. *Delaware,* 438 U. S. 154 (1978), when these statements were deleted the affidavit was still sufficient to establish probable cause. In this appeal from the denial of their motions to suppress, appellants contend that the affidavit is insufficient because: (1) several material false statements were made in violation of *Franks;* (2) the information supplied to agent Magee by the confidential informants was unreliable; and (3) the affidavit did not suport a finding that the wiretap was necessary. Appellants also contend that the district court erred in failing to require disclosure of the government's confidential sources.

II.

A.

Appellants contend that after deleting misrepresentations from Magee's affidavit it fails to establish either probable cause for belief that appellants were engaged in illegal gambling activity or that a wiretap was necessary.[1]

Appellants contend that several of Magee's statements are false and must be stricken from his affidavit because they are either intentional misrepresentations or were made by Magee with reckless disregard for the truth. *Franks* v. *Delaware* teaches that a reviewing court must consider an affidivit after it is stripped of intentional and reckless false statements to determine whether a finding of probable

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[1]The federal wiretap statute allows interception of wire communications:

> if the judge determines on the basis of the facts submitted by the applicant that —
>
> (a) there is probable cause for belief that an individual is committing, has committed, or is about to commit a particular offense enumerated in section 2516 of this chapter;
>
> (b) there is probable cause for belief that particular communications concerning that offense would be obtained through such interception;
>
> (c) normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous;
>
> (d) there is probable cause for belief that the facilities from which, or the place where, the wire or oral communications are to be intercepted are being used, or are about to be used, in connection with the commission of such offense, or to be leased to, listed in the name of, or commonly used by such person.

18 U.S.C. § 2518(3).

cause was justified. 438 U. E. 154 (1978); *see also United States* v. *Namer*, 680 F. 2d 1088, 1093 (5th Cir. 1982).

We review the district court's findings on whether particular passages in an affidavit are *Franks* false statements on a clearly erroneous standard. *Hindman* v. *City of Paris*, 746 F. 2d 1063, 1067 (5th Cir. 1984); *United States* v. *Freeman*, 685 F. 2d 942, 948 n.3 (5th Cir. 1982). Whether the affidavit supports a probable cause finding after *Franks* misrepresentations have been deleted is reviewed *de novo*. *Freeman*, 685 F. 2d at 948.

Appellants contend that Magee's entire affidavit is suspect because twenty of its forty-two pages contain verbatim sentences from an affidavit submitted in support of a wiretap authorization in an unrelated gambling case referred to as the DeLuna case. Magee admitted using the DeLuna affidavit as a guide. He copied extensively from the general background and "need for intercept" sections of the DeLuna affidavit; Magee substantially copied the DeLuna affidavit's description of the affiant's background in law enforcement, certain characteristics of gambling operations and informants, and assertions supporting the necessity for a wiretap.

Magee did not inform Judge Politz of his use of the DeLuna affidavit. Appellants contend first that Magee's failure to disclose to Judge Politz that he copied substantial portions of the DeLuna affidavit violates *Franks* and is grounds for rejecting the entire affidavit.

We agree with the district court that Magee's failure to inform Judge Politz that he used the DeLuna affidavit as a guide is not, alone, a sufficient ground to invalidate the entire affidavit. The fact that Magee copied parts of the DeLuna affidavit does not necessarily make them *Franks* misrepresentations. To the contrary, Magee testified that he carefully considered the truth and applicability

of the statements he copied from the DeLuna affidavit before incorporating them into his affidavit in this case.

Appellants also contend that several specific statements Magee made in his affidavit are false representations which the district court erroneously refused to delete from the affidavit.

1) In the "need for intercept" section of the affidavit Magee stated that "Arthur Dick Stevens' residence located on 356 Jennifer Lane . . . is in a remote and sparsely populated area, making a successful surveillance impossible." It is undisputed that Stevens' Jennifer Lane residence, where the wiretap was made, is in a heavily populated area. The quoted statement apparently describes Stevens' rural residence on Caplis Sligo Road from which Stevens moved just before the warrant was issued. Stevens resided in the rural residence when Magee first submitted the wiretap application to the Department of Justice for approval and Magee failed to amend his affidavit to reflect the change in the description of the neighborhood after Stevens moved. Magee testified during the suppression hearing that surveillance was impossible in the affluent Jennifer Lane neighborhood and that he knew this when he submitted the affidavit to Judge Politz. The district court did not commit clear error in finding that the substance of Magee's statement — that surveillance was impossible — was true and that Magee did not intentionally or recklessly mislead Judge Politz.

2) Appellants next contend that portions of Magee's affidavit which were copied from the DeLuna affidavit and which allege that the four confidential informants feared physical reprisal are *Franks* misrepresentations. We disagree. Magee testified at trial that his four confidential sources informed him at the time he prepared the affidavit that they feared physical reprisal if they were identified.

3) Appellants direct our attention to a portion of Magee's affidavit substantially copied from the DeLuna affidavit which states that "[I]n the past, Arthur Dick Stevens has resisted search efforts undertaken by law enforcement officers by quickly destroying his gambling records." Magee testified that a confidential source informed him prior to submission of the affidavit that Stevens shredded all bookmaking records in a paper shredder soon after the completion of sports events on which bets were taken. The district court's finding that no intentional or reckless misrepresentation was made by this statement is therefore not clearly erroneous.

4) In the following sentence from Magee's affidavit he closely traced another passage from the DeLuna affidavit. "On several occasions, Special Agents of the FBI have observed Stevens driving to the gambling office on a circuitous route, constantly looking over his shoulder." Magee testified that he included the above statement because it was true. Because the affidavit made it clear that Stevens' gambling business was located in his home, the statement that MaGee followed Stevens to his gambling *office* rather than his residence is not untrue or misleading. The district court's holding that this was not a *Franks* misrepresentation is not clearly erroneous.

5) MaGee's affidavit states that the Internal Revenue Service attempted to place Stevens under surveillance in an earlier investigation and Stevens detected the surveillance almost immediately. Appellants contend that this statement is contradicted by an affidavit the IRS submitted during its investigation of Stevens that indicates that its surveillance lasted several months.

The fact that the IRS surveillance extended over a period of several months, does not necessarily lead to the conclusion that it was a successful surveillance. One of Magee's fellow agents, Fuller, talked to IRS agents who

participated in the earlier investigation. Fuller was informed that the IRS surveillance was discovered almost immediately; Magee relied on a memo setting forth these facts from agent Fuller. The district court did not err in finding that this was not a *Franks* misrepresentation.

6) In the "need for intercept" section of the affidavit Magee copied a passage from the DeLuna affidavit that provided: "Undercover investigative techniques have not been attempted in this matter. The participants in the legal activity have been socially acquainted with each other over a long period of time. The injection of a new personality into the network could be accomplished only at the level of a bettor." Appellants contend that the evidence shows that all of the participants had not been socially acquainted for a long period of time. Although the district court did not rule on this argument, Magee testified that he obtained information from the confidential sources indicating that the participants in the gambling operation were close knit and this made it difficult to infiltrate the upper levels of the organization. Even if the assertion that all participants were long time social acquaintances is a *Franks* misrepresentation it was not material under *Franks* because when deleted the affidavit still supports a finding of probable cause.

7) Magee stated in his affidavit that a confidential source advised Special Agent Fuller on September 24, 1983, "that Stevens operates a large-scale organized crime-connected bookmaking operation at Route 2, Box 815, Caplis Sligo Road, Bossier Parish, Louisiana." Appellants contend that this violates Franks because a contact sheet on which this information was recorded indicates the source referred to Stevens' Jennifer Lane residence rather than his Caplis Sligo Road residence. The discrepancy in the street name is likely attributable to inadvertence and confusion. Magee testified that he consulted with the source before he pre-

pared his affidavit and verified that his source observed the bookmaking operations in Stevens' Caplis Sligo Road residence. Even if this was an intentional or reckless misrepresentation, which is unlikely, and this passage is deleted, the affidavit still supports a probable cause finding.

The district court held that Magee made two *Franks* misrepresentations; the first was Magee's assertion that he had personally examined all FBI documents relative to a particular confidential informant when in fact other agents had conducted this examination. The other *Franks* misrepresentation was Magee's statement that a confidential source had furnished information to the New Orleans FBI office when in fact the informant had given information only to Magee in the Shreveport office. We agree with the district court that those two misrepresentations are relatively insignificant. In light of the wealth of detailed information Magee revealed from four confidential informants and other sources concerning appellants' gambling activity, the district court did not err in concluding that the affidavit contains ample evidence to establish probable cause and support the wiretap authorization when these *Franks* misrepresentations are deleted.

B.

Appellants contend that the affidavit fails to establish probable cause to intercept wire communications from Stevens' Jennifer Lane residence because most of the information Magee received from the confidential sources and set out in his affidavit relates to Stevens' Caplis Sligo Road residence. We disagree. The fact that Stevens chose to move his operation while he was the target of an investigation does not negate probable cause. Information from one of the confidential sources revealed that gambling activity was continuing in the new residence on Jennifer Lane

after Stevens moved and the telephone records corroborated this information. There was good reason to believe that the operation that had been investigated on Caplis Sligo Road was continuing in the new location. This was sufficient to support the finding of probable cause.

C.

Appellants argue that because some *Franks* misrepresentations were included in the affidavit it should now be subject to exacting scrutiny. Under this high standard, appellants argue that none of the four confidential sources are adequately reliable to furnish information that will support a probable cause determination.

The applicable standard for determining whether information received from informants establishes probable cause is set forth succinctly in *Illinois* v. *Gates:*

> The task of the issuing magistrate is simply to make a practical, common sense decision whether, given all the circumstances set forth in the affidavit before him, including the "veracity" and the "basis of knowledge" of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place. And the duty of a reviewing court is simply to insure that the magistrate had a "substantial basis for . . . conclud[ing]" that probable cause existed.

462 U. S. 213, 238-39 (1983). Magee related details of the occasions when the informants obtained information concerning appellants' gambling activity. Magee alleged that he or his fellow agents had worked with the informants for varying periods of time ranging from two months to several years which gave them an opportunity to evaluate their credibility. Agent Magee also described telephone

records that corroborated the information he obtained from the informants. We agree with the district court that Judge Politz had a substantial basis for finding probable cause.

D.

Appellants' contend Magee's affidavit failed to establish the necessity requirement of section 2518. Section 2518 (1)(c) requires "a full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous." *See also* 18 U.S.C. § 2518(3)(c).

We agree with the district court's statement of the applicable law as follows:

> "The purpose of Section 2518(1)(c) is not to foreclose electronic surveillance until every other imaginable method of investigation has been successfully attempted." *U. S.* v. *Webster,* 734 F. 2d 1048, 1055 (5th Cir. 1984). "The courts will not invalidate a wire tap order because defense lawyers are able to suggest *postfactum* some investigative technique that might have been used and was not." *U. S.* v. *Hyde,* 574 F. 2d 856, 867 (5th Cir. 1978). "It is enough that the affidavit explains the . . . failure of several investigative techniques that reasonably suggest themselves." *Id.*

District Court's Memorandum Ruling at 38, 10 Rec. 1732.

Magee's affidavit is sufficient. In the "need for intercept" section of the affidavit, Magee relates the difficulty he experienced in gathering information by traditional investigative techniques and why he did not believe these techniques would bear fruit: He reported that IRS attempts at surveillance were detected and that his own lim-

ited attempts at physical surveillance of appellants had been unsuccessful; he detailed the unwillingness of his confidential sources to testify before a grand jury or in open court for fear of physical reprisal; Magee asserted that a seizure of appellants' gambling records would probably not be helpful because "such records are normally maintained . . . in incomplete and sketchy form." The fact that Stevens promptly shredded documentary evidence also pointed toward the need for an intercept of wire communications.

Appellants also contend that if Magee had obtained the information developed by the IRS in its investigation of appellants three years earlier, the wiretap may have been unnecessary. Magee contacted the IRS concerning its investigation and learned that its traditional investigative techniques had failed. He also learned that no indictments were returned against many of the targets of the IRS investigation and only three misdemeanor convictions were obtained. Based on this information, Magee assumed that the IRS investigation failed to yield evidence to support felony convictions and he sought no further assistance from the IRS. Magee's failure to seek further information from the IRS under these circumstances was not unreasonable. Magee's affidavit amply supports the issuing magistrate's conclusion that traditional methods of investigation were unlikely to be fruitful, and demonstrates the necessity for a wire intercept.

III.

Appellants contend that because they established that Magee made several *Franks* misrepresentations, the Government should now be required to disclose the names of its confidential sources. Appellants seek to question Magee's sources and determine whether any of the informa-

tion Magee attributed to them violates *Franks* and must be deleted in determining probable cause. Appellants contend the government is using its informant privilege not to protect the identity of its informants, but rather to prevent further *Franks* misrepresentations from being discovered.

In determining whether we should require disclosure of the government's confidential informants, we must balance "the public interest in protecting the flow of information against the individual's right to prepare his defense." *Roviaro* v. *United States*, 353 U. S. 53, 62 (1957). The burden of showing the necessity of disclosing the identity of the confidential sources lies with the defendant. *Rugendorf* v. *United States*, 376 U. S. 528, 535 (1964). "The necessity for disclosure depends upon 'the particular circumstances of each case, taking into consideration the crime charged, the possible defenses, the possible significance of the informer's testimony, and other relevant factors.'" *Id.* at 534-35 (quoting *Roviaro*, 353 U. S. at 62).

We agree with the district court that the *Franks* misrepresentations found in Magee's affidavit are relatively insignificant and do not reflect so adversely on his credibility or that of the informants that the government is required to disclose the names of its informants.[2]

AFFIRMED.

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[2]Appellants contend that Ronald Hairford admitted to defense counsel that he was one of the confidential sources and therefore has waived any privilege against disclosure the government may have had. Appellants seek to question Hairford about information attributed to him in the affidavit that appellants feel may represent *Franks* violations. The district court found that Ronald Hairford had not disclosed his identity as a confidential source to defense counsel. This finding is not clearly erroneous.

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 85-4685

UNITED STATES OF AMERICA, - - *Plaintiff-Appellee,*

v.

ARTHUR RICHARD STEVENS, III,
ROBERT L. MERILLAT, Et Al., - *Defendants-Appellants.*

Appeals from the United States District Court
for the Western District of Louisiana

ON PETITIONS FOR REHEARING

—Filed August 20, 1986

Before REAVLEY, RANDALL and DAVIS, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petitions for rehearing filed in the above entitled and numbered cause be and the same are hereby denied.

Entered for the Court:

(s) W. Eugene Davis
United States Circuit Judge

IN THE

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF LOUISIANA
SHREVEPORT DIVISION

Criminal Actions No. 84-50049-01, -02, 03, -04, -05, -06, -07, -08, -09, -10, -11, -12, -13, -14, -15, -16, -17 and -18

UNITED STATES OF AMERICA

v.

ARTHUR RICHARD STEVENS, ROBERT L. MERILLAT, RICHARD HAVILAND CARSON, LARRY P. BOURQUE, RONALD DEAN MERCHANT, LEO B. EVANS, GLEN WILLIAM ROCKETT, CHARLES BRYAN WEBSTER, BEN ROGERS, REUBEN GOLDSTEIN, VICTOR KYLE CALLAHAN, ROBERT LEE CALLAHAN, JESS MICHAEL ROSS III, GEORGE MICHAEL GAUTHIER, JERRY MCCOLLUM, NORMAN SHABAS, LLOYD GILLIS STEWART JR. and FRED F. BARNES SR.

MEMORANDUM RULING—Filed June 13, 1985

Pursuant to 28 U.S.C. § 636, all pretrial motions were referred to Magistrate James M. Barton for hearing and his Report and Recommendation. After testimony was adduced in an 11-day evidentiary hearing, and that testimony was considered in light of the contentions and arguments of the defendants, Magistrate Barton recommended that all the motions to suppress be denied. The Magistrate

also recommended that the motion to dismiss or, in the alternative, to suppress evidence based upon violation of the integrity of the judicial process and fundamental fairness be denied. In response, the defendants filed a timely opposition to the Report and Recommendation, attacking the affidavit underlying the wiretap authorization and the Magistrate's Report and Recommendation. After reading defendants' opposition, and after a review of the transcript, this court finds that the motions on behalf of defendants must be denied. The Report and Recommendation of Magistrate Barton is adopted, and he is commended in his conduct of the lengthy and complex hearing.

On December 13, 1983, Billy J. Guin, an Assistant United States Attorney, made an application for an Order authorizing the interception of wire communications on telephone lines located at 356 Jennifer Lane, Shreveport, Louisiana, the residence of Arthur Richard Stevens. The application for the wire intercept was based upon the affidavit of James Edwin MaGee, Special Agent, Federal Bureau of Investigation. This affidavit was presented to and sworn before the Honorable Henry A. Politz, United States Circuit Judge, by designation, who authorized the intercept of wire communications for a period of 30 days. Upon termination of the intercept on January 4, 1984, and after finding probable cause that Arthur Richard Stevens was engaged in criminal activity at 356 Jennifer Lane, Magistrate Barton issued a warrant for the search and seizure of certain gambling paraphernalia and documents from the Stevens residence.

As a result of the wiretap authorization and the search and seizure, two grand jury indictments were issued. On February 2, 1984, Arthur Richard Stevens III and Robert L. Merillat were indicted and charged with violations of 18 U.S.C. §§ 1084 and 2. Thereafter, on November 21, 1984, the federal grand jury returned a 69-count indictment which

named Stevens and 17 other defendants, charging them with violations of 18 U.S.C. §§ 371, 1952, 1955 and 2. The government dismissed the original indictment against Stevens and Merillat, leaving the indictment of November 21, 1984, against which the pending motions are lodged.

The investigation, wiretap authorization and indictment of the 18 defendants have generated substantial pretrial motions which have required an in-depth review of the operations of the United States Attorney's Office and the Federal Bureau of Investigation. Defendants attack not only the validity of the affidavit underlying the wiretap authorization, but assert that the conduct of government agents violates the integrity of the judicial process and the fundamental fairness expected to be accorded to the defendants under the Constitution. Peripheral to and apart from normal pretrial motions filed by defendants was a motion for judicial inquiry filed by N. Graves Thomas, counsel for defendant Stevens. After the Thomas motion was referred to the Office of Professional Responsibility of the United States Justice Department, and after an investigation by a special grand jury into the alleged criminal misconduct of FBI special agents, this court ruled that there was no evidence of any wrongdoing in the investigation by the FBI relating to movant, N. Graves Thomas. The investigation by the independent agency within the Justice Department, though incidental to this action, is unrelated in fact and substance to the pending motions.

As reviewed in the Report and Recommendation, the Magistrate conducted a 2-week evidentiary hearing which permitted defendants every opportunity to present evidence in support of their motions to suppress evidence and to dismiss the indictment. The lengthy brief in opposition is asserted to refute the recommendations of the Magistrate, and to support defendants' contentions that:

1. The wiretap and all evidence resulting therefrom should be suppressed under *Franks* v. *Delaware,* 438 U. S. 154, 98 S. Ct. 2674, 57 L. Ed. 2d 667 (1978).
2. The MaGee affidavit fails to supply probable cause;
3. The government failed to exhaust the investigative alternatives pursuant to 18 U.S.C. § 2518(1)(c); and
4. The lack of probable cause in the wiretap order for each alleged participant resulted in a constitutionally invalid wiretap order.

To provide some order of analysis, this ruling follows the outline of contentions here noted.

FRANKS V. DELAWARE:

In *Franks* v. *Delaware,* the United States Supreme Court held:

> [W]here the defendant makes a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit, and if the allegedly false statement is necessary to the finding of probable cause, the Fourth Amendment requires that a hearing be held at the defendant's request. In the event that at that hearing the allegation of perjury or reckless disregard is established by the defendant by a preponderance of the evidence, and with the affidavit's false material set to one side, the search warrant must be voided and the fruits of the search excluded to the same extent as if probable cause was lacking on the face of the affiidavit.

438 U. S. at 155-56, 98 S. Ct. at 2676.

The court, basing its ruling on the Warrant Clause of the Fourth Amendment, stated:

> In deciding today that, in certain circumstances, a challenge to a warrant's veracity must be permitted, we derive our ground from language of the Warrant Clause itself, which surely takes the affiant's good faith as its premise: "[N]o Warrants shall issue, but upon probable cause, supported by Oath or affirmation. . . ." Judge Frankel, in *United States* v. *Halsey*, 257 F. Supp. 1002, 1005 (S.D. N.Y. 1966), aff'd, Docket No. 31369 (CA2, June 12, 1967) (unreported), put the matter simply: "[W]hen the Fourth Amendment demands a factual showing sufficient to comprise 'probable cause,' the obvious assumption is that there will be a *"truthful* showing" (emphasis in original). This does not mean "truthful" in the sense that every fact recited in the warrant affidavit is necessarily correct, for probable cause may be founded upon hearsay and upon information received from informants, as well as upon information within the affiant's own knowledge that sometimes must be garnered hastily. But surely it is to be "truthful" in the sense that the information put forth is believed or appropriately accepted by the affiant as true.

438 U.S. at 165-66, 98 S.Ct. at 2681.

Defendants contend that statements within the affidavit are "untruthful," some being the result of intentional falsehoods and some others being the result of a "conscientious attempt not to learn information." Defendants contend that there was no criminal investigation, but merely an attempt to obtain a wiretap, to build an affidavit in support of a wiretap application. In pursuit of this purported goal, Special Agent MaGee is alleged to have consciously avoided learning of an investigation into gambling activities previously conducted by federal agents. With limited knowledge of the specific facts and circum-

stances supporting authorization of the wiretap, Special Agent MaGee allegedly enhanced the substance of the probable cause showing by including statements which are purportedly false and omitting other statements, the absence of which evinces a reckless disregard for the truthfulness of the information put forth by the affiant. Defendants' assertions are based on MaGee's extensive use of the "DeLuna" wiretap affidavit in the preparation of the instant affidavit, the lack of FBI forms 302 or "contact sheets" to substantiate the information included in the affidavit, and specific inconsistencies in the affidavit itself.

a. The DeLuna Affidavit:

At the evidentiary hearing, Special Agent McGee testified on three occasions and addressed the facts and circumstances surrounding the preparation of the wiretap affidavit. As the first witness in the hearing, Agent MaGee testified that he wrote the original affidavit by hand, submitted the original for typing, made certain typographical or grammatical changes, and, after additional changes, submitted the affidavit to the Justice Department for approval. MaGee stated that he used another affidavit originating, he believed, from a New Orleans investigation in the construction of the instant affidavit. MaGee stated that he worked for two or three weeks in preparing the affidavit and then submitted it for review by an Assistant United States Attorney, Billy Guin. He did not recall whether other changes were made or suggested by Guin. Furthermore, MaGee testified that the final draft submitted to the Justice Department and later submitted to the authorizing judge was not the product of subsequent drafts, but the result of the original draft with only minor changes in grammar or spelling.

Billy Guin, the Assistant United States Attorney with whom MaGee had coordinated the construction of the affidavit, later testified and revealed a scenario for construc-

tion somewhat different from that provided by MaGee. Guin testified that the original drafting of the affidavit occurred over a 6- to 8-week period and though originally drafted in hand by MaGee, was submitted to Guin on three to four occasions for revision. Guin testified that he worked on the affidavit and wiretap application approximately 20 hours per week during the last three to four weeks of preparation. Though the extent of revision was not revealed, Guin recalled that the affidavit originally submitted to the Justice Department was not the affidavit later presented to the authorizing judge. Guin stated that an unexpected change of residence by Arthur Richard Stevens in late November required that two pages be added to the original affidavit in order to reflect the new location. The second version was forwarded to the Justice Department, later approved and used by Guin and MaGee when applying for the wiretap order from Judge Politz.

Guin also provided a copy of the affidavit extensively followed by MaGee for the purpose of a format. Guin had retained a copy of the affidavit submitted by Special Agent John R. Morello in the DeLuna case in New Orleans, and agreed to submit a copy of the affidavit to the defendants. After comparing the Magee and DeLuna affidavits, it was determined that several sentences, paragraphs, and pages of the DeLuna affidavit were copied word-for-word in the instant affidavit. Of the 42-page MaGee affidavit, approximately 15 pages were substantially the same as those in the Deluna affidavit. When Agent MaGee returned to the witness stand, he recalled his extended use of the DeLuna affidavit, but explained that the facts in his affidavit were true. As he read each line of the DeLuna affidavit, the facts coincided with what he had learned and when the substance of the DeLuna affidavit applied, he used it as his own.

The question raised by defendants is whether the affidavit submitted by Agent MaGee represented his observations, contacts, knowledge and conclusions or those of Agent Morello from the DeLuna case. Defendants contend that the wholesale incorporation of the DeLuna affidavit violated *Franks* v. *Delaware* — constituting reckless disregard for the truth by failure to advise the authorizing judge of his extensive use of the DeLuna affidavit and constituting an assertion of false statements by including parts of the DeLuna affidavit which were not relevant to the Stevens investigation.

In support of their contention, defendants note that Agent MaGee quoted from the DeLuna affidavit when describing his own background, when describing certain characteristics of informants, and when justifying the wiretap in the "need of intercept" section of the affidavit. In fact, the first six pages of the affidavit are substantially verbatim copies of the DeLuna affidavit, with only the names and locations changed. However, these pages include an introduction of the persons and crimes revealed by the affiant's investigation and would logically be an integral part of any federal wiretap affidavit.

Additionally, in reviewing what the affiant had learned in gambling-related investigations during his 13 years as a special agent of the FBI (pages 7-10 of the affidavit), MaGee apparently copied the exact words of the DeLuna affidavit. He reviewed, as did Agent Morello, the definition of various terms unique to gambling operations and specific procedures and techniques generally followed by bookmakers in conducting their illegal activities. The factual review of gambling operations was not limited to the investigation of persons who were subject of the wiretap, however, but included the affiant's experiences and knowledge of other gambling activity. Defendants introduced no evidence to rebut the validity of the facts reviewed

by Agent MaGee, but argued that statements concerning the use of water-soluble paper, fictitious names, and "commission men" in gambling operations were not factually relevant to the MaGee investigation. As admitted by MaGee, he was not aware and did not assert that water-soluble paper was used in the Stevens operation; but, Magee stated that it was used in other gambling operations with which he was familiar. MaGee also stated that gamblers contacting Stevens used code names which could only be recognized by those familiar with this gambling operation. Though the assertions on pages 7-10 of the affidavit may not be as closely related to the actual events in this case as to those in DeLuna, the affiant did not limit the lessons learned to the current investigation, but provided a general review for the authorizing judge of the structure and methods of gambling operations. Therefore, the affiant's review of lessons learned, though copied verbatim from the DeLuna affidavit, were not untrue and did not construe a violation of *Franks* v. *Delaware.*

The MaGee affidavit also incorporated a large part of the DeLuna "need for interception" section. Again, extensive use of the DeLuna affidavit, in conjunction with the failure to advise the authorizing judge of such use, is asserted to be misleading, to be improper, and to constitute a violation of *Franks.* Defendants contend that the substitution of another's words and work product into the MaGee affidavit culminated in the incorporation by convenience, as opposed to the incorporation of known fact. However, the broad conclusions urged by defendants are not founded upon facts adduced at the hearing:

1. On page 37 of the affidavit, the recitation that "at least four potential witnesses have been interviewed by Special Agents of the FBI concerning the illegal gambling activities of Arthur Dick Stevens and David Rager" is

closely analogous to statements in DeLuna. Though the Magistrate refused to require the government to disclose the names of the four "potential witnesses," the affiant restated in court the facts asserted in the affidavit, and provided in chambers the names of these potential witnesses and the facts and circumstances surrounding the agents' contact with these persons.[1]

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[1]In *Roviaro* v. *U. S.*, 353 U. S. 53, 77 S. Ct. 623 (1957), the United States Supreme Court explained:

> The purpose of the [informant] privilege is the furtherance and protection of the public interest in effective law enforcement. The privilege recognizes the obligation of citizens to communicate their knowledge of the commission of crimes to law enforcement officials and, by preserving their anonymity, encourages them to perform that obligation.
>
> The scope of the privilege is limited by its underlying purpose.

353 U. S. at 59-60, 77 S. Ct. at 627. Founded upon the public policy to protect effective law enforcement, this privilege protects those who confidentially volunteer information of violations of the law to officers charged with enforcement of those laws. *Gordon* v. *U. S.*, 438 F. 2d 858, 875 (5th Cir. 1971). "Persons who supply information only after being interviewed by police officers, or give information as witnesses during the course of an investigation are not informers." *Id.*

Though these potential witnesses did not volunteer substantial information of criminal activity, they did volunteer information about their knowledge of on-going illegal gambling activity, and did communicate their fear of reprisal resulting from merely discussing the existence of such activities. The testimony of Agent MaGee shows that the communications of these potential witnesses were used to corroborate the existence of on-going illegal gambling activity. The communication of their knowledge of the commission of crimes, whether it is first-hand knowledge or the result of hearsay, can be encouraged only by refusing to reveal their names. Any citizen who communicates with a law enforcement officer about the existence of criminal activity is volunteering information that

(Footnote Continued on Next Page)

2. On page 37 of the affidavit, the recitation that "informants CS-4, CS-1, CS-2 and CS-3 have refused to testify about the gambling operation for fear of physical reprisals against them by Arthur Dick Stevens, David Reger, Kenneth Ezell, and others" is also analogous to that in DeLuna. Again, Agent MaGee and Myron Fuller, a Special Agent in the Shreveport office who provided significant information in support of the affidavit, testified that each informant expressly stated his fear of physical reprisal. While the peculiar order of the confidential sources is the same in both the MaGee and DeLuna affidavits and tends to support the defendants' allegation that the person copying the DeLuna affidavit did so thoughtlessly, without consideration of the content of that copied, the defendants have not shown the facts to be untrue. The relentless examination of Agents MaGee and Fuller, in conjunction with in-camera questioning of agents receiving information from CS-1, produced testimony consistent with the facts asserted in the affidavit.
3. On page 37, the statement that "special agents of the FBI have observed Stevens driving to the gambling office on a circuitous route, constantly looking over his shoulder," follows that in DeLuna. Defendants attack the veracity of this statement because of the similarity between it and the DeLuna statement. Upon inquiry, Agent MaGee reaffirmed the substance of his statement, remembering that he was accompanied by Frank Webb or another agent at the time this conduct was observed.

(Footnote Continued From Preceding Page)

should be encouraged. Furthermore, in this preliminary hearing, the inquiry to be generated by the disclosure of these witnesses is not sufficiently critical to the defendants' motion to warrant disclosure of the names of these witnesses.

Though Arthur Richard Stevens[2] and Frank Webb were called to testify, defendants failed to introduce evidence rebutting the sworn statement of MaGee. The bare contention by defendants that the MaGee assertion is "nothing short of bewildering," without evidence to support their conclusion, does not meet the burden imposed by *Franks* v. *Delaware*.

4. On page 38, as stated in the DeLuna affidavit, MaGee states that, "[i]nterceptions of wire communications could enable your affiant to overhear conversations among the bookmakers relating to which office they intend to use next and telephone numbers at which they can be reached by bettors and other participants in the illegal gambling business." Such assertion is only questionably applicable to the Stevens investigation. After reviewing the transcript, it appears as though MaGee was uncertain whether Stevens would return to the Capis-Sligo location or would remain at the Jennifer Lane location. This statement was apparently incorporated into the second draft of the affidavit, the draft reflecting the gambling operation after the move to Jennifer Lane, and is justified by the change in circumstances occasioned by Stevens' move.

5. On page 38, consistent with DeLuna, MaGee states that "[f]urther, in the past, Arthur Dick Stevens has resisted search efforts undertaken by law enforcement officers by quickly destroying his gambling records." Though

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[2]In the memorandum in support of the opposition to the Report and Recommendation of the Magistrate, the defendants moved to introduce the affidavit of Arthur Richard Stevens, a defendant who testified at the evidentiary hearing. The admission of the affidavit of a witness would deny the government of its right to cross-examine the witness. Since the defendant testified at the hearing and had full opportunity to introduce all desired testimony, the motion is denied. Rule 802, Federal Rules of Evidence.

> defendants attack such statement with the assertion that Stevens was not even present at the time of the 1980 search of his residence, defendants' assertion is not supported by evidence introduced at the hearing. Stevens did not so testify; nor did he rebut or explain the existence or purpose of the paper shredding machine located at his residence.

As previously noted, *Franks* v. *Delaware* protects defendants' Fourth Amendment rights by requiring that any false statement knowingly and intentionally, or with reckless disregard for the truth ("*Franks* statements"), included in the affidavit must be excluded for the purpose of determining probable cause. Further, omissions which are made intentionally or with a reckless disregard for the accuracy of the affidavit violate *Franks* and must be incorporated into the affidavit for a determination of probable cause. *U. S.* v. *Martin,* 615 F. 2d 318, 329 (5th Cir. 1980). Furthermore, the omission of facts which are "clearly critical to a finding of probable cause" permit the inference of reckless disregard as defined by *Franks. Id.*

The failure to advise Judge Politz that MaGee had relied substantially on the words and structure of another is not, in itself, an omission that constitutes reckless disregard for the truth. The substance of the affidavit is not tainted by the form or structure used by the affiant. *Franks* does not address the issue of plagiarism, but considers the effect of intentional misstatements in a warrant affidavit. The wholesale incorporation of certain statements raises the suspicion that the agent failed to verify certain facts. Defendants have attempted to buttress that suspicion by rebutting parts of MaGee's assertions, but have failed to show substantial disparities between the facts and MaGee's representations. Defendants have failed to submit proof sufficient to establish that the facts, cir-

cumstances, contacts and knowledge asserted in the affidavit were exclusively those of another; nor have they proven that the failure to advise the authorizing judge of extensive use of the DeLuna affidavit constituted an omission of fact critical to a finding of probable cause. Perhaps it could be found to be disingenuous to make such fulsome and slavish use of a form document, but the surplus verbiage found there does not render the affidavit useless *or* its use by the FBI agent as reckless disregard for truth in failing to tell Judge Politz he had used a form for guidance.

b. Contact Sheets — Failure to Substantiate:

Defendants also contend that the documents used to memorialize communications with informants do not fully substantiate the affiant's assertions. Defendants assert that the absence of a contact sheet or FBI Form 302 evidencing all information received by the agent shows a reckless disregard for the truth in accumulating that background information necessary to a wiretap affidavit.

The response to this assertion is two-fold: first, MaGee does not state in his affidavit that documentation within the offices of the FBI substantiates every assertion in the affidavit; second, neither Agent MaGee nor Agent Fuller ever testified that each assertion in the affidavit is founded upon facts recorded in contact sheets or FBI Forms 302. Though each would refer to contact sheets when questioned by defense counsel if information were unknown, neither maintained that the affidavit was substantiated in whole by personal notes or by more formal documentation. This claim, instead, arises from defendants, who reiterate time and again in their opposition to the Report and Recommendation their self-perceived claim of reliance on contact sheets to substantiate the affidavit.

As a general proposition, the failure to record communications with informants in an effort to ensure the accuracy of facts used in criminal prosecutions could evidence a

reckless disregard for the truth. But, the agents in this investigation recorded their contacts with informants, maintained those records in the New Orleans office of the FBI, and produced those records at the hearing. Though a contact sheet for an informant designated as CS-3 was not available for review by the court, the absence of the contact sheet does not show a deliberate effort to withhold or control the flow of information or constitute reckless disregard for the truth of the assertions in the affidavit. In fact, Agent Myron Fuller, who received the information recorded in the missing contact sheet, testified with particularity about the events of September 20, 1983, and admitted his belief that two contact sheets were generated by communications with CS-3 on that date. When questioned about the extent and clarity of his memory, Fuller explained that the September 20 contact was the first date that CS-3 had permitted Fuller to record the context of their communications. Fuller recited the information provided by CS-3, including the informants' explanation of the structure of gambling operations in the Shreveport area and Stevens' relationship to those operations. Though Fuller was not able to explain why Stevens was not mentioned in the September 20 contact sheet provided to the court, he was sure that the information contained in the missing contact sheet was relayed to Agent MaGee. Though parts of the affidavit relating to CS-3 are founded upon the memory of a special agent of the FBI, the credibility of Agent Fuller was not diminished through extensive cross-examination by defense counsel. The absence of this contact sheet does not support a finding of intentional disregard by the agents in handling information provided by informants.

Defendants assert also that the contact sheets do not contain specific reference to the informants' fear of physical reprisal. Agents Fuller and MaGee testified that such

information is important to a gambling investigation and that important information is normally recorded in notes, contact sheets, or FBI Forms 302. Fuller explained, however, that fear of physical reprisal is not recorded as a matter of standard procedure. The informants' fear of physical reprisal is the usual characteristic and, therefore, not normally included in a contact sheet. Also, Fuller testified that CS-3 and CS-4 specifically advised him of their fear of physical reprisal. Furthermore, Agent MaGee testified that CS-2 expressed a fear of physical reprisal also. Accordingly, this assertion is also without merit.[3]

c. Contact Sheets — Inconsistencies:

Defendants also argue that certain inconsistencies or disparities between FBI documents and the affidavit reveal that Agent MaGee included *Franks* statements in the affidavit. Beginning with that portion of the affidavit relating to CS-1, defendants contend that MaGee was not the author of pages 12-16 of the affidavit, requiring that those pages be expunged; that MaGee's introductory statement that he had personally examined and reviewed *all* reports written by special agents of the FBI regarding information provided by CS-1 was intentionally false or made with reckless disregard for the truth; that the affidavit included facts substantially more incriminating than those contained in contact sheets; and that the contact sheets contained no reference to fear of physical reprisal.

Defendants also contend that the refusal to permit defendants to confront CS-1 or the special agents of the FBI to whom CS-1 had provided information constituted error. As revealed in the affidavit, CS-1 did not provide information directly to Agent MaGee, but provided information to special agents of the FBI who, in turn, advised MaGee of

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[3] [Placed under seal]

the information contained in the affidavit. As recognized by the government in argument before the Magistrate, under normal circumstances the government cannot withhold the name of the agent to whom information was given. Otherwise, an agent who allegedly received information from an informant could effectively be used to create probable cause without that agent's assertions ever being subject to the court's scrutiny. *See, Rugendorf* v. *U. S.*, 376 U. S. 528, 84 S. Ct. 825 (1964). The government asserted, however, that disclosure of the names of the FBI agents would, in turn, reveal the identity of the informant. To ensure the validity of the government's argument, the Magistrate held an *in camera* hearing with the agents of the FBI who received information from CS-1. The Magistrate inquired into the relationship between CS-1 and the special agents receiving the information to establish the facts supporting the conclusion that disclosure of any person beyond MaGee would also expose the identity of the informant. The Magistrate also questioned the agents about the informant's reliability, the factual basis for the informant's knowledge, the extent of corroboration of the information provided, and the informant's fear of physical reprisal. The Magistrate properly held that disclosure of the identity of the special agents of the FBI would disclose the name of the informants. The scope of examination by the Magistrate precludes the need for further inquiry, and provides a proper balance between the defendants' right under *Franks* and the need to protect information, as recognized in *Roviaro* v. *U. S.*, 353 U. S. 53, 77 S. Ct. 623 (1957).

As noted, defendants maintain that MaGee is not the author of that portion relating to CS-1, thereby requiring that it be expunged, citing *U. S.* v. *Davis*, 714 F. 2d 896 (9th Cir. 1983). In *Davis*, the affiant included in the affidavit information received by a fellow agent, but failed

to change the exact wording proposed by the receiving agent to reflect that the affiant had not received the information directly. The representation that the information was received directly by the affiant constituted a *Franks* statement and the court excluded that portion of the affidavit in accordance with *Franks* guidelines. However, in this case, the affiant states that:

> 10) In October, 1983, CS-1 advised special agents of the FBI, who in turn advised affiant, that he/she personally knows Arthur Dick Stevens and has learned directly from conversations with Arthur Dick Stevens and others as follows: . . .

Affidavit, p. 12. This statement expressly rebuts the defendants' assertion.

Defendants also assert that the statement by MaGee that he had personally examined and reviewed *all* reports written by special agents of the FBI regarding information provided by CS-1 relative to Stevens and others constituted a *Franks* statement. Testimony at the evidentiary hearing revealed that Special Agent MaGee had received information regarding CS-1 in two "air-tells," or teletype messages, but had not received copies of other documents maintained by the FBI containing the information received from CS-1. Specifically, contact sheets written by special agents of the FBI who had received information from CS-1 had not been reviewed by MaGee prior to signing the affidavit. Upon inquiry, MaGee explained that the information contained in the contact sheets was also incorporated into the "air-tells" previously received. Therefore, in substance, he had examined and reviewed the information provided by CS-1. The court finds this assertion to be misleading. The information provided by CS-1 was substantial. MaGee surely knew that such information was contained in contact

sheets or FBI Forms 302. Though he had read only summaries provided by other agents, MaGee included the assertion that, " I have personally examined and reviewed all reports written by special agents of the FBI regarding information provided by CS-1 relative to Arthur Dick Stevens and others." This court finds that such conduct constitutes reckless disregard for the accuracy or truthfulness of this statement within the affidavit; therefore, this statement must be excluded from the affidavit. The materiality of this exclusion will be discussed at a later point.[4]

Defendants also argue that information, when transcribed from the contact sheets onto the affidavit, became substantially more incriminating than when received by the agents. The evidence shows that CS-1 communicated with "Dick" (last name unknown ["LNU"]) about certain gambling operations; that the special agent relayed that CS-1 had contacted "Arthur Dick Stephens" about these gambling operations; and that MaGee stated in the affidavit that CS-1 had contacted "Arthur Dick Stevens" about these matters. However, the evidence shows that MaGee corroborated the information from CS-1 by ascertaining to whom telephone number 1-800-551-8107 was assigned, matched "Dick" (LNU) to the subscriber, and correlated the facts submitted by CS-1 with those known by MaGee. Defendants do not rebut the truthfulness of the statement in the affidavit, but assert that such changes by FBI agents reflect an intent to mislead the authorizing judge. Though the more specific statement may enhance the credibility and reliability of the information provided, defendants have not shown a reckless disregard *for the truth* of matters asserted in the affidavit.

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[4]*See*, p. 33.

Defendants include in their assertions that the fear of physical reprisal is not memorialized in contact sheets or other notes for each confidential source. As previously noted, the in-chambers hearing with special agents receiving information from CS-1 regarding Arthur Richard Stevens reveals that the affiant's assertion was true.

Turning to purported inconsistencies regarding CS-2, only one of numerous allegations must be addressed in this ruling. On page 17 of the affidavit, MaGee supports the reliability of information from CS-2 by stating that "CS-2 has furnished information to the New Orleans office of the Federal Bureau of Investigation concerning illegal gambling in the Bossier City, Louisiana, area for a period in excess of two months." Affiant goes on to state that the information supplied by CS-2 has been corroborated by law enforcement offices in the Bossier City area and has been determined to be accurate. Defendants vehemently attack MaGee's assertion, noting that CS-2 has never provided information to the *New Orleans* office of the FBI. MaGee confirmed this allegation, testifying that CS-2 had provided information only to him. MaGee also stated that since he was an agent with the New Orleans office of the FBI, CS-2 had, in fact, provided information to that office. However, Myron Fuller, the Agent-in-Charge of the Shreveport-Monroe-Alexandria area and supervisor of MaGee, testified that he worked for the Shreveport office of the FBI. He showed no hesitation in differentiating completely the operations of the Shreveport office and the New Orleans office of the FBI.

The extreme importance of complete candor with the court cannot be over-emphasized in a case where the facts supporting probable cause originate in confidential sources whose identities are unknown to the defendants and whose identities are protected by the informant privilege. Probable cause must be determined by an independent magis-

trate; he must consider each assertion in the affidavit to make an independent evaluation of the veracity and reliability of facts alleged and to make an independent determination of probable cause. Subtle manipulation of facts within the affidavit which improperly enhance the reliability of an informant constitutes reckless disregard for the accuracy and truth of information therein. The reference to the New Orleans office of the FBI is unfounded in fact, but is based upon MaGee's unique understanding of the FBI command structure. Therefore, the reference to the New Orleans office of the FBI is found to violate the principles of *Franks* v. *Delaware,* and must be deleted from the affidavit. The materiality of that deletion will be addressed at a later time.

Turning to CS-4, defendants allege that the failure to include CS-4's criminal background in the affidavit constitutes a willful deception of the authorizing judge. As previously noted, the omission of facts which are critical to a determination of probable cause tends to show a reckless disregard for the truth. *U. S.* v. *Martin, supra.* Myron Fuller, the agent to whom CS-4 originally provided information, testified that he had obtained the rap sheet on CS-4 as a matter of standard procedure. He assured the court that such information had been relayed to MaGee. However, MaGee testified that he was unaware that CS-4 was a user of drugs and did not recall the criminal history of that informant. Whether the failure to include such information in an affidavit would constitute reckless disregard for the truth depends upon the informant's criminal record in relation to other factors establishing his reliability and trustworthiness.[6]

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[5] *See,* p. 34.

[6] [Placed under seal]

Defendants further contend that any assertion by MaGee that confidential informants have expressed fear of physical reprisal is contrary to MaGee's underlying sentiments about Stevens. This contention is based upon the testimony of Charles Glorioso, who recalled a conversation with Agent MaGee in March 1984. According to Glorioso, MaGee stated that gamblers, as a general rule, are not violent people. Additionally, MaGee is alleged to have stated that he knew that Arthur Richard Stevens was not a violent person. The record also reflects that Glorioso reported this conversation immediately to Stevens and later stated to a third person that he would do anything to help Dick Stevens. In view of the potential bias of this witness, the Magistrate apparently attached little meaning to this testimony. In light of MaGee's absolute denial of the contents of such a conversation, the defendants' assertion is without merit. Furthermore, MaGee stated in his affidavit that the confidential sources had voiced their fear of physical reprisal, and not that he, personally, had expressed such fears. The deliberate falsity whose impeachment is permitted is that of the affiant, not that of the informant. *Franks,* 438 U. S. at 171, 98 S. Ct. at 2684.

IDENTIFICATION OF INFORMANTS:

An integral part of defendants' contention underlying the *Franks* v. *Delaware* motion is the allegation that the prosecutors are using the informant privilege as a sword to protect the affidavit, as opposed to a shield for the protection of duty-conscious citizens. Defendants contend that evidence adduced at the hearing identifies CS-4, and that the continued assertion of the informant privilege violates their constitutionally protected rights. As recognized by the defendants, the disclosure of the identity of an informant calls "for a balancing of the public interest in pro-

tecting the flow of information against the individual's right to prepare his defense." *Roviaro* v. *U. S.*, 353 U. S. 53, 62, 77 S. Ct. 623, 629 (1957). "Whether a proper balance renders nondisclosure erroneous must depend on the particular circumstances of each case, taking into consideration the crime charged, the possible defenses, the possible significance of the informer's testimony, and other relevant factors." *Id.* Furthermore, as reviewed by the Magistrate at the evidentiary hearing, once the identity of the informer has been revealed to those who would have cause to resent the communication, the informant privilege no longer exists. 353 U. S. at 60, 77 S. Ct. at 627.

Though defendants contend that Ronald Hairford disclosed his purported identity as an informant to defense counsel Graves Thomas, the Magistrate ruled otherwise. Thomas testified about a July 1984 meeting between him and Ronald Hairford, but the absence of testimony concerning particular information provided to the attorney by Hairford, in light of defendants' failure to call Hairford, a subpoenaed witness, resulted in a ruling that the purported informant had not disclosed his identity. Ronald Hairford later testified at the hearing and rebutted Thomas' allegations, stating that he had never advised defense counsel that he was an informant for the government. After reviewing the transcript of that testimony, and considering the reasoning of the Magistrate, this court finds that Ronald Hairford did not waive any informant privilege that the government may have.

Defendants also maintain that the disclosure of the informant is essential to a fair trial. In the absence of disclosure, the protections of the Fourth Amendment, as interpreted by *Franks* v. *Delaware,* are allegedly unavailable to these defendants. Specifically, defendants contend that they have proven that certain facts originating with confidential sources, and included in the affidavit, are false.

Without being able to confront the confidential source or sources, the defendants are unable to prove whether the falsity can be attributed to the confidential source or to the affiant. Therefore, assert the defendants, the protections of *Franks* v. *Delaware* are meaningless in the absence of an opportunity to determine the origin of facts already proved to be false.

As previously noted, *Roviaro* requires a balancing of interests in determining whether to disclose the identity of an informant. When the asserted need for disclosure is not associated with the determination of guilt or innocence, the issue takes on a different complexion:

> What *Rovario* thus makes clear is that this court was unwilling to impose an absolute rule requiring disclosure of an informer's identity even in formulating evidentiary rules for federal criminal trials. Much less has the Court ever approached the formulation of a federal evidentiary rule of compulsory disclosure where the issue is the preliminary one of probable cause, and guilt or innocence is not at stake. Indeed, we have repeatedly made clear that federal officers need *not* disclose an informer's identity in applying for an arrest or search warrant. As was said in *United States* v. *Ventresca,* 380 U. S. 102, 108, 85 S. Ct. 741, 745, 13 L. Ed. 2d 684, we have "recognized that 'an affidavit may be based on hearsay information and need not reflect the direct personal observations of the affiant,' so long as the magistrate is 'informed of some of the underlying circumstances' supporting the affiant's conclusions and his belief that any informant involved *'whose identity need not be disclosed* * * * was "credible" or his information "reliable".' *Aguilar* v. *State of Texas, supra,* 378 U. S., at 114, 84 S. Ct., at 1514." (Emphasis added.)

McCray v. *State of Illinois,* 386 U. S. 300, 311, 87 S. Ct. 1056, 1062 (1967). The nature and status of the current proceedings weigh heavily against disclosure.

Furthermore, the burden to show why disclosure of the confidential source is essential lies with the defendant. *See, Rugendorf* v. *U. S.,* 376 U. S. 528, 535, 84 S. Ct. 825, 829 (1964). Defendants have failed to show that each allegedly false statement, which can not be attributed to the confidential source or to the affiant because of the informant privilege, is critical to a determination of probable cause. In the absence of such a showing, defendants have failed to establish the necessity for disclosure at this stage of the proceedings.[7] The general claim that the confidential source is needed to attack the validity of the affidavit is not enough.

PROBABLE CAUSE IN THE AFFIDAVIT:

Under *Franks,* that part or portion of the affidavit which is found to be knowingly false or made with reckless disregard for the truth must be excluded; the court then must determine whether the affidavit still is sufficient, for purposes of a wiretap application, to establish that:

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[7]The Supreme Court in *Franks* v. *Delaware* reserved the question of informant privilege in this situation. "We need not decide, and we in no way predetermine, the difficult question whether a reviewing court must ever require the relevation of the identity of an informant once a substantial showing of falsity has been made." 430 U. S. at 171, 98 S. Ct. at 2684. The substantial showing generating the evidentiary hearing concerned the exhaustion of alternative investigation means, not the assertions originating with the confidential sources. There has been no significant showing of falsity of facts critical to a determination of probable cause; therefore, disclosure of the identity of the informants is not warranted.

> (a) There is probable cause for belief that an individual is committing, has committed, or is about to commit a particular offense enumerated in section 2516 of this chapter;
>
> (b) There is probable cause for belief that particular communications concerning that offense will be obtained through such interception;
>
> * * *
>
> (d) There is probable cause for belief that the . . . place where, the . . . oral communications are to be intercepted [is] being used or [is] about to be used, in connection with the commission of such offense, or . . . [is] commonly used by such person.
>
> 18 U.S.C. § 2518(3).

In *Aguilar* v. *Texas,* 378 U. S. 108, 84 S. Ct. 1509, 12 L. Ed. 2d 723 (1964), and *Spinelli* v. *U. S.,* 393 U. S. 410, 89 S. Ct. 584, 21 L. Ed. 2d 637 (1969), the United States Supreme Court established a two-part test for evaluating an affidavit based on an informant's tip: (1) the affidavit had to provide sufficient indicia of the veracity or reliability of the informant; and (2) the affidavit had to include the factual basis for the informant's knowledge. The Supreme Court recently has rejected a rigid application of this two-part test; instead, it has adopted a test for evaluating such affidavits by viewing "the totality of the circumstances." *Illinois* v. *Gates,* 462 U. S. 213, 103 S. Ct. 2317, 76 L. Ed. 2d 527 (1983).

> The task of the issuing magistrate is simply to make a practical, common sense decision whether, given all the circumstances set forth in the affidavit before him, including the 'veracity' and 'basis of knowledge' of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will

> be found in a particular place. And the duty of the reviewing court is simply to ensure that the magistrate had a 'substantial basis' for . . . [finding] that probable cause existed.

Gates, 103 S. Ct. at 2332. In addressing the applicability of the veracity and reliability factors in *Aguilar-Spinelli,* the court stated that "a deficiency in one may be compensated for, in determining the overall reliability of a tip, by a strong showing as to the other, or by some other indicia of reliability." *Gates,* 103 S. Ct. at 2329.

Defendants attack the affidavit as it relates to each of the confidential informants. While defendants assert that the allegations of CS-1 were unreliable, the confidential source revealed specific facts about Stevens' gambling operation, to include the maximum wagers permitted, telephone numbers used, gambling information received directly from Arthur Richard Stevens, and methods of operation. The confidential source learned this information directly from conversations with Stevens and others. Though the exact dates and times of those conversations are not included, the lack of such information does not destroy the reliability of the information received. Affiant stated that this confidential source has provided information to the FBI for more than three years, and that such information had led to the arrest and conviction of more than ten individuals on federal felony charges. Telephone numbers provided by the confidential source were corroborated through an independent investigation by the FBI. Additionally, though the court excludes the statement that MaGee personally had examined and reviewed all reports written by the special agents of the FBI, the exclusion of that statement is not critical to a determination that the information provided by CS-1 was reliable or to a determination of probable cause. The affidavit still includes a

statement sufficient to establish the source of the information. *See,* page 12, Paragraph 10 of the Affidavit.

Defendants make the same assertion concerning veracity and reliability of information received from CS-2. While the affidavit does not include the specific dates and times that information was obtained by CS-2, it does state that CS-2 is a bettor, and that such information was obtained through contact with Arthur Richard Stevens, bookmakers, and other bettors. Additionally, the source stated that he had met personally with Stevens on a given date to make it possible to place certain wagers with Stevens. The information provided by CS-2 was corroborated by various law enforcement agencies, both federal and local. Additionally, the information provided was corroborated by the information from other informants. *See, U. S.* v. *Harris,* 403 U. S. 573, 91 S. Ct. 2075, 29 L. Ed. 2d 723 (1971). Even excluding the reference to the New Orleans office of the FBI, the affidavit still shows that the source had provided information which had been consistently corroborated by independent investigation. Again, the information is sufficient to establish the reliability of the informant under *Illinois* v. *Gates, supra.*

Turning to CS-3, defendants' allegation of unreliability is also unfounded. Though the affidavit does not include the specific dates or sources for the information received from CS-3, it does state that this source gained information from *personal* and business relationships with numerous bookmakers and bettors in the Shreveport/Bossier City area. Additionally, Myron Fuller confirmed all of the allegations asserted in the affidavit.

The last confidential source subject to attack is CS-4. The reliability of this informant is based upon information previously provided to the Internal Revenue Service, which led to numerous arrests and convictions relating to gambling activity in 1981. MaGee learned of the informant's

relationship with the IRS from Fuller, who previously had spoken with the IRS investigators. The information provided by CS-4 was corroborated by correlating the telephone numbers provided by the confidential source with the telephone toll records and by information obtained from other confidential sources. The information provided was acquired, in part, through personal contacts with Arthur Richard Stevens on given days at given locations. The affidavit certainly provides sufficient information to evaluate the veracity and reliability of the information received from this confidential source.

Exhaustion of Investigative Alternatives Pursuant to 18 U.S.C. § 2518:

Title III, 18 U.S.C. §§ 2510-2520, requires that the application for a wiretap contain "a full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous." 18 U.S.C. § 2518(1)(c). A wire intercept may be authorized only if it is found that "normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous." 18 U.S.C. § 2518(3)(c). Relying on these provisions, defendants contend that the wiretap application is deficient, thereby requiring the suppression of all evidence derived from the wire intercept.

The affidavit meets the requirements of Title III, with the evidence presented at the evidentiary hearing supporting McGee's assertions that alternative investigative techniques had failed or appeared unlikely to succeed. As stated in the affidavit, MaGee used limited physical surveillance, telephone toll record correlation, and confidential sources during his initial investigation; he also tapped his experience in gambling investigations to project the effec-

tiveness of other techniques. While MaGee was questioned for hours about the effectiveness of alternative means, the evidence was clear that the Stevens residence could not be effectively surveilled. Donny G. Nichols, a retired detective with 20 years' experience in law enforcement, who had provided an affidavit in support of defendants' motion for an evidentiary hearing under *Franks*, testified that he was unable to surveill the Stevens residence without exposure. Nichols also confirmed MaGee's conclusion that agents could not be posted at both ends of Jennifer Lane to determine the identity of those visiting the Stevens residence. He and MaGee stated that the exclusivity of this residential area would surely expose any attempt to employ such techniques. Defendants also inquired about the use of pen register; MaGee explained that the pen register would not provide any information for the WATS lines used by Stevens. MaGee further explained that resources required to determine and investigate each subscriber of numbers obtained by the pen register would not justify the use of this technique. Additionally, while MaGee admitted that he had contacted numerous persons in an attempt to obtain additional information regarding the Stevens investigation, he testified that further attempts to contact bettors for additional information would potentially expose the intensity of his investigation. Furthermore, concerning the use of previously employed investigative techniques by federal agents in the 1979-80 IRS investigation, MaGee explained that seven misdemeanor convictions resulting from various investigating techniques employed over extended periods of time did not evidence an effective investigative plan upon which he could base his investigation. Though MaGee had not personally contacted the IRS agent conducting the 1980 investigation, he had considered the previously employed techniques when discussing his investigation with Agent Fuller, who was familiar with the IRS

investigation. And lastly, the record shows that MaGee responded to numerous inquiries about various creative investigative techniques, to include the use of joggers or helicopters for visual surveillance of the Stevens residence. Such inquiry did not, however, produce evidence which rebuts MaGee's conclusion that alternative investigative techniques would not be successful in this gambling investigation.

"The purpose of Section 2518(1)(c) is not to foreclose electronic surveillance until every other imaginable method of investigation has been unsuccessfully attempted." *U. S.* v. *Webster,* 734 F. 2d 1048, 1055 (5th Cir. 1984). "The courts will not invalidate a wire tap order because defense lawyers are able to suggest *post factum* some investigative technique that might have been used and was not." *U. S.* v. *Hyde,* 574 F. 2d 856, 867 (5th Cir. 1978). "It is enough that the affidavit explains the . . . failure of several investigative techniques that reasonably suggest themselves." *Id.*

The affidavit submitted in support of the Stevens wire tap application meets these standards. The information available from limited physical surveillance and confidential sources did not enable the affiant to obtain information of the inner-operation of the illegal business. The confidential sources and other potential witnesses voiced their fear of physical reprisal; the agent would have been unable to infiltrate further the close-knit organization which he faced. Continued efforts to employ physical surveillance would disclose the ongoing investigation, while not producing evidence of communications within the gambling operations, those communications providing evidence critical to a gambling prosecution. The pen registers would not produce information which could effectively be used by the investigators. Accordingly, the court finds that MaGee complied with the requirements of Title III, pursuing the wiretap

application after exhausting the investigative alternatives available to him.

Overbreadth of Wire Tap Authorization:

The wiretap authorization is alleged to be constitutionally invalid because it authorizes the intercept to continue until the earlier of 30 days, or until communications of 13 persons are intercepted, when the wiretap application and supporting affidavit do not establish probable cause that all 13 persons were engaged in the unlawful activity subject of investigation. The wiretap order includes the names of persons whose communications are to be intercepted in accordance with 18 U.S.C. § 2518(4), which provides that:

> Each order authorizing . . . the interception of any wire or oral communication shall specify . . . the identity of the person, if known, whose communications are to be intercepted. . . .

Additionally, the wiretap order permits the intercept to continue until certain communications are intercepted. The length of the intercept is founded upon the probable cause showing in the affidavit, that showing required by 18 U.S.C. § 2518(1). That section requires the government to name all individuals for whom the government has probable cause and whose communications it expects to intercept over the target telephone line. *U. S.* v. *Donovan*, 429 U. S. 413, 429, 97 S. Ct. 658, 668, 50 L. Ed. 2d 652 (1977). The defendants assert that the attempt to comply with the provisions of Title III have produced a wiretap order which is constitutionally overbroad.

This court finds that defendants' argument is without merit. In view of the standards outlined in *Illinois* v. *Gates, supra*, the absence of some of the underlying facts upon which the informant based his conclusion that crim-

inal activity had taken place does not preclude a finding of probable cause. *See, U. S.* v. *Kolodziej,* 712 F. 2d 975, 977 (5th Cir. 1983). Rather than relying solely upon the specific allegations relating to each named interceptee, the court notes that the reliability of the informant, specifically CS-4, is fortified by the evidence of past cooperation with law enforcement officials producing convictions for illegal gambling activity and by the particularity of information to the affiant. That information was corroborated by information from other confidential sources and further reinforced by the correlation of telephone toll records. *See, U. S.* v. *Hyde,* 574 F. 2d 856, 863 (5th Cir. 1978). Considering the totality of circumstances, rather than specific facts in isolation, the court finds that the strong showing of reliability provides support to the factual "basis of knowledge" element sufficient to permit a finding of probable cause.

Furthermore, assuming that probable cause did not exist for each of the 13 persons, the defendants have not shown that the wire intercept violated their constitutionally protected rights. Affidavits supporting search warrants must show that evidence of crime will be found at a particularly described location. U. S. Const., Amend. IV. Absent a sufficient description of the locality to be searched, the warrant is facially invalid and evidence derived from the search must be suppressed. *Steele* v. *U. S.,* 267 U. S. 498, 45 S. Ct. 414, 69 L. Ed. 757 (1925). The Fourth Amendment also commands that the warrant must particularly describe the things to be seized. If the search warrant does not specifically describe the things to be seized, the remedy is not to suppress all evidence seized, but to exclude the items improperly taken. *U. S.* v. *Cook,* 657 F. 2d 730 (5th Cir. 1981). The affidavit provides an overwhelming showing of the particular location and telephone lines to be seized. The wiretap order certainly describes the location and

facilities to be intercepted with particularity. The wiretap order is not, therefore, facially invalid. Moreover, the length of the wire intercept is valid as long as it does not exceed the scope of the probable cause shown in the supporting affidavit. The existence of probable cause as to 12 of the 13 individuals would surely permit a wire intercept until communications involving those 12 persons were received. Defendants introduced no evidence at the evidentiary hearing that would support a finding that any communications intercepted pursuant to the wiretap order exceeded the scope of probable cause shown in the affidavit. Accordingly, the assertion that the wiretap order is overly broad, thereby encroaching defendants' constitutionally protected rights, is not valid.

Motion to Dismiss for Governmental Misconduct:

Closely related to the *Franks* motion is defendants' motion to dismiss or, in the alternative, to suppress evidence based upon violation of the integrity of the judicial process and fundamental fairness. Defendants oppose the Report and Recommendation as it relates to this motion, but do not assert specific factual or legal arguments in support of their opposition. In summary form, this court recognizes the legal standards for judicial intervention upon an allegation of due process violations by the government — where the conduct of law enforcement agents is so outrageous that it shocks the universal sense of justice, the mandates of the Due Process Clause of the Fifth Amendment warrant judicial intervention in the form of a dismissal. *U. S.* v. *Russell*, 411 U. S. 423, 93 S. Ct. 1637 (1973); *see also, U. S.* v. *Acosta*, 526 F. 2d 670 (5th Cir. 1976). The evidence adduced at the evidentiary hearing fully supports Magistrate Barton's recommendation that this motion be denied; the defendants have presented no evidence of conduct which shocks the conscience. Accordingly, defendants'

motion to dismiss or, in the alternative, to suppress evidence based upon violation of the integrity of the judicial process and fundamental fairness is DENIED.

In summary, after considering the transcript of the evidentiary hearing, the Report and Recommendation of the magistrate and the opposition filed by defendants, Magistrate Barton's recommendations are hereby ADOPTED. Defendants' motions are DENIED.

An Order consistent with the terms of this Memorandum Ruling will issue herewith.

THUS DONE AND SIGNED at Shreveport, Louisiana, this 13th day of June, 1985.

(s) Tom Stagg
Tom Stagg, Chief Judge

IN THE

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF LOUISIANA
SHREVEPORT DIVISION

Criminal Actions No. 84-50049-01, -02, 03, -04, -05, -06, -07, -08, -09, -10, -11, -12, -13, -14, -15, -16, -17 and -18

UNITED STATES OF AMERICA

v.

ARTHUR RICHARD STEVENS, ROBERT L. MERILLAT, RICHARD HAVILAND CARSON, LARRY P. BOURQUE, RONALD DEAN MERCHANT, LEO B. EVANS, GLEN WILLIAM ROCKETT, CHARLES BRYAN WEBSTER, BEN ROGERS, REUBEN GOLDSTEIN, VICTOR KYLE CALLAHAN, ROBERT LEE CALLAHAN, JESS MICHAEL ROSS III, GEORGE MICHAEL GAUTHIER, JERRY MCCOLLUM, NORMAN SHABAS, LLOYD GILLIS STEWART JR. and FRED F. BARNES SR.

ORDER—Filed June 13, 1985

For the reasons outlined in the foregoing Memorandum Ruling,

IT IS ORDERED that the motion to suppress evidence derived from the wire tap authorization is DENIED.

IT IS FURTHER ORDERED that the motion to suppress physical evidence is DENIED.

IT IS FURTHER ORDERED that the motion to dismiss or, in the alternative, to suppress evidence based on violation of the integrity of the judicial process and fundamental fairness is DENIED.

IT IS FURTHER ORDERED that the motion to disclose the identities of each of the confidential informants is DENIED.

DATED AND SIGNED at Shreveport, Louisiana, this 13th day of June, 1985.

(s) Tom Stagg
Tom Stagg, Chief Judge

United States of America vs.

United States District Court for

DEFENDANT: BEN ROGERS

W/D OF LOUISIANA - SHREVEPORT DIVISION

DOCKET NO → CR-84-50049-09

JUDGMENT AND PROBATION/COMMITMENT ORDER AO 245 (9/82)

COUNSEL

In the presence of the attorney for the government the defendant appeared in person on this date → MONTH: JULY DAY: 1 YEAR: 1985

[ ] WITHOUT COUNSEL However the court advised defendant of right to counsel and asked whether defendant desired to have counsel appointed by the court and the defendant thereupon waived assistance of counsel

[X] WITH COUNSEL FRANK E. HADDAD & JAMES C. McMICHAEL, JR.
(Name of Counsel)

PLEA

/as to counts 1 & 2
[X] GUILTY, and the court being satisfied that there is a factual basis for the plea. [ ] NOLO CONTENDERE, [ ] NOT GUILTY after hearing the defendant under oath that the plea was voluntarily offered

FINDING & JUDGMENT

There being a finding/~~XXXXX~~ of
[ ] NOT GUILTY. Defendant is discharged
[X] GUILTY. as to counts 1 & 2

Defendant has been convicted as charged of the offense(s) of 18 U.S.C. 371 - Conspiracy (Count 1); 18 U.S.C. 1955 & 2 - Conducting an illegal gambling business and aiding & abetting (Count 2)

AND ON THIS 12th DAY OF SEPTEMBER, 1985

SENTENCE OR PROBATION ORDER

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: ~~the defendant is~~ ~~XXXX